IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 94 of 1985

For Approval and Signature :

HONOURABLE **MS. JUSTICE R.M.DOSHIT**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to civil judge ?

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CHANDULAL DAMODAR - Appellant(s)

Versus

SHANTABEN VASANTGAR - Defendant(s)

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Appearance :

MR TV SHAH for Appellant
MR JR NANAVATI for Defendant

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CORAM : HONOURABLE MS. JUSTICE R.M. DOSHIT

Date : 17/04/2007

ORAL JUDGMENT

This Appeal preferred under Section 100 CPC by the plaintiff in Regular Civil Suit No. 150 of 1979 arises from the judgment and order dated 11th

September, 1984 passed by the learned Assistant Judge, Junagadh in Regular Civil Appeal No.96 of 1983. The Appeal is admitted to final hearing on the following substantial question of law :-

[1] **When the right to discharge rain water is upheld, does it not necessarily and incidentally include the right to repair the khal through which the rain water is discharged?**

The appellant-plaintiff instituted above referred Regular Civil Suit No. 150 of 1979 in the Court of learned Civil Judge [JD], Mangrol. According to the plaintiff, he was the owner of the house situated at Mangrol. He had a right to discharge the rain and sewer water through the property south of his house. That he enjoyed the said easementary right for last fifty years. The defendant had purchased the property at the south of the plaintiff's house and had started construction thereon. That the defendant intended to obstruct the discharge of rain water, a right which was enjoyed by the plaintiff for past fifty years and that the defendant intended to discharge the rain water through the property of the plaintiff. The plaintiff also claimed that the plaintiff had a right

to enter the property of the defendant to repair the passage of rain water discharge. The learned Civil Judge by his judgment and decree dated 30th March, 1983 decreed the suit partially. The plaintiff's right to discharge storm water through the property of the defendant was upheld. The defendant was directed not to obstruct the plaintiff from discharging the storm water through the property of the defendant. The defendant was also restrained from obstructing the plaintiff from repairing the wall and cleaning the storm water passage.

Feeling aggrieved, the plaintiff preferred Regular Civil Appeal No. 76 of 1983 in the Court of Assistant Judge, Junagadh. The defendant preferred the cross objections. The learned Assistant Judge, by the *impugned* judgment and order dated 11th September, 1984 dismissed the appeal preferred by the plaintiff and allowed the cross objections [Exh.12] preferred by the defendant in so far as the plaintiff was permitted to enter into the property of the defendant to repair the storm water passage. Therefore, the present Appeal.

It be noted that both the Courts below have

recorded concurrent finding that the plaintiff had a right to discharge storm water through the property of the defendant but had no right to discharge sewer water through the property of the defendant. The right to discharge storm water would not necessarily entail a right to enter the property of the defendant. The learned Assistant Judge has observed that the plaintiff's aforesaid easementary right is described in the sale deed Exh.44. The said Deed Exh.44 refers to the right to discharge storm water but not to right to enter the property of the defendant. In absence of a specific right to enter the property of the defendant, conferred upon the plaintiff, in my opinion, the learned Assistant Judge has rightly held that the plaintiff had a right to discharge the storm water through the property of the defendant. The plaintiff's easementary right to discharge the storm water through the property of the defendant did not necessarily entail right to enter the property of the defendant to repair the storm water passage.

For the aforesaid reason, the Appeal is dismissed with cost.

{Ms. R.M Doshit, J.}

*Prakash**